IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1985 OF 2007

Nivrutti Dagadu Mate & Anr. ...Petitioners
V/s.
Shri Raghunath Ramchandra Borade & Anr. ...Respondents

Ms.Smita Gaidhani for the Petitioners.
None for the Respondents.

CORAM : V.M. KANADE, J.

DATED : JULY 9, 2007

P.C. :-

1. Heard the learned Counsel for the petitioners.

2. The petitioner takes exception to the order passed by the trial Court rejecting his application for appointment of Court Commissioner.

3. It is submitted that the trial Court had erred in rejecting the application for appointment of the Court Commissioner particularly since it is alleged that there is encroachment in respect of the boundaries of the land of the petitioner. The learned Counsel relied on the judgment of this Court in the case of **Kashinath s/o. Ramkrishna Chopade Vs. Purushottam Tulshiram**

Tekade & Ors. reported in 2005(4) ALL MR Page 519 wherein it was held that in case there is a dispute in respect of boundaries of the property, it is not always possible to produce oral evidence to prove encroachment in respect of the boundaries.

4. In my view, the submission made by the learned Counsel cannot be accepted. The petitioner had before filing the present suit filed another suit in which he had claimed that the respondents have encroached upon the said property of the petitioner. In the said suit, the DILR had conducted the survey and had carried out measurements of the suit property and had submitted his report. This suit which was filed by the petitioner was dismissed and the appeal against that order was also dismissed. Thereafter, the present suit has been filed. In this suit, it has been averred in the plaint that after the rejection of the appeal in the earlier suit, the respondent-plaintiff had encroached upon the boundary wall and was trying to demolish the said boundary wall between the two properties. In my view, the trial Court had rightly held that there was no

evidence to show that there is any change in the circumstances after the first suit was dismissed. I do not see any reason to interfere with the order passed by the trial Court. Writ petition is dismissed.

5. It is always open for the petitioner to lead evidence and if necessary, make an application for measurement of the boundaries. All issues are kept open.

(V.M. KANADE, J.)